Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RALPH J. BAVARO and ELIZABETH C. HOGAN,

Petitioners,

—v.—

GEORGE E. PATAKI, individually and as Governor of the State of New York; JAMES G. NATOLI, individually, and as Director of the State Operations of the State of New York; BARBARA ANN DEBUONO, individually, and as Commissioner of the New York State Department of Health; KAREN SCHIMKE, individually, and as Executive Deputy Commissioner of the New York State Department of Health; JERRY JASINSKI, individually, and as Acting General Counsel of the New York State Department of Health; STATE OF NEW YORK; DEPARTMENT OF HEALTH,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether the First Amendment permits public employees to be dismissed on account of their political affiliation in the absence of any showing that political affiliation is necessary to the effective performance of their jobs but simply because their positions are exempt from civil service protections, entail "technical expertise," involve supervisory responsibility, or "reflect the views of policymakers."

INTERESTED PARTIES

All parties to this appeal are identified in the caption on the cover of the petition. Because no corporations are involved in this matter, there are no parent companies and no subsidiaries to list.

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PETITION FOR A WRIT OF *CERTIORARI*

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Petitioners Ralph J. Bavaro and Elizabeth C. Hogan respectfully request that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on November 21, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 130 F.3d 46 (2d Cir. 1997), and is set forth in the appendix to this petition at A1-12. The opinion of the United States District Court for the Northern District of New York pertaining to Ms. Hogan is reported at 953 F. Supp. 22 (N.D.N.Y. 1997), and is set forth in the appendix at A13-24. The district court's opinion pertaining to Mr. Bavaro is unreported but is set forth in the appendix at A25-32.

JURISDICTION

This is a petition for a writ of *certiorari* from a decision and judgment of the United States Court of Appeals for the Second Circuit entered on November 21, 1997. On January 28, 1998, Justice Ginsberg extended the deadline for the filing of this petition to Saturday, March 21, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The pertinent provisions of the United States Constitution involved in this case are found in the First Amendment, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The material facts in this case are not in dispute. Petitioners Ralph Bavaro and Elizabeth Hogan served as lawyers prosecuting medical-license revocation cases in administrative proceedings within the New York State Department of Health (DOH) until April 7, 1995, when they were fired to "make room" for political appointees of then newly-elected Governor George E. Pataki. *See* App. at A3-4. Mr. Bavaro served as an Associate Counsel in the Bureau of Professional Conduct within the Health Department's Division of Legal Affairs, and Ms. Hogan served as Assistant Counsel in the same Bureau. *See id.* The record establishes the following facts about the petitioners' positions:

* The responsibility of an Assistant Counsel such as Ms. Hogan is to present cases of professional misconduct to an administrative hearing officer once the decision to initiate disciplinary proceedings has been made by superior officials within DOH. This presentation includes such routine tasks such as preparing documents and witnesses, introducing evidence, and presenting oral argument. *See* Hogan App. at A114-15, 116, 117 (job descriptions).

* The responsibility of an Associate Counsel such as Mr. Bavaro is similarly limited to the conduct of administrative proceedings, but also includes the supervision of Assistant Counsels. Bavaro App. at A148 (job description); *id.* at A109 (¶¶ 7-8).

* Associate and Assistant Counsel have no authority to decide which cases of medical misconduct DOH prosecutes; are not authorized to draft charges against a doctor unless the Director of the Office directs them to do so; are not authorized to conduct plea

negotiations and/or accept pleas in the absence of specific approval and acceptance by the Director of the Office; are not authorized to talk to the press without the express permission of the Department's public relations office and must forward to that office any communications from the press; and are not authorized to give legal advice or counsel to elected officials or to speak on their behalf. *See* Hogan App. at A140-41 (¶¶ 12, 14-17); Bavaro App. at A109-10 (¶¶ 11, 13-16).

* After she was fired, Ms. Hogan received from DOH a form certifying that she was not a "Policy Maker" for purposes of the state's ethics law, *see* Hogan App. at A180, and Mr. Bavaro never was designated by DOH as a policymaker in annual statements filed by DOH with the State Ethics Commission, *see* Bavaro App. at A214 (¶ 5). The guidelines used by the Department to make such designations provide that a policymaking position is one in which the "person exercises responsibilities of a broad scope in the formulation of plans for the implementation of goals or policy for a state agency or acts as an advisor to an individual in such a position." Hogan App. at A121-22 (¶ 2(c)); Bavaro App. at A273-74 (¶ 2(c)).

* The General Counsel of the Department of Health from 1980 until 1995 submitted an affidavit in which he stated that, on the basis of his experience, he knew of "no basis for the contention that political loyalty or party affiliation is a relevant or even an appropriate requirement for the effective performance of the duties of an Associate Counsel." Bavaro App. at A283-84 (¶ 5). In a second affidavit, he stated that this assessment "applies equally, if not more so, to the position of Bureau Assistant Counsel." Hogan

App. at A182 (¶ 4).

Following their dismissals, Mr. Bavaro and Ms. Hogan each filed suit claiming that they had been discharged because of their political affiliation in violation of their First Amendment rights. Bavaro filed his suit in New York State Supreme Court, from which the defendants removed the action to the United States District Court for the Northern District of New York. Hogan filed a separate suit in the same federal court, and both cases were assigned to Judge Thomas J. McAvoy. The district court granted summary judgment to the defendants in each case, finding that the defendants had fired the plaintiffs because of their political affiliation but concluding that the plaintiffs' jobs were of such a nature that the plaintiffs could be dismissed on these grounds. *See* App. at A19-22 (Hogan); A26-32 (Bavaro).

Petitioners each appealed to the Second Circuit, which consolidated their cases and affirmed. Recognizing that this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980), was controlling, the Court of Appeals opened its analysis with the statement, "We have understood *Branti* as standing for the proposition that political affiliation is an appropriate job requirement when there is a rational connection between shared ideology and job performance." App. at A8 (quotation, emendation, and citation omitted). The lower court then held that such a "rational connection" existed because the jobs of Mr. Bavaro and Ms. Hogan were civil-service exempt, entailed technical expertise, reflected the views of policymakers, and, in the case of Mr. Bavaro, involved supervisory responsibility. *See* App. at A9-10.

REASONS FOR GRANTING THE WRIT

The Second Circuit's legal analysis deviates significantly from the standards established by this Court and permits substantial numbers of public employees to be fired because of their political affiliation even though, as was true with the petitioners, political affiliation is wholly irrelevant to the effective discharge of their jobs. Because of this, because the lower courts "have issued 'conflicting and confusing' opinions" in their efforts to interpret the *Branti v. Finkel* standards, *Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (*en banc*) (quoting *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)), *cert. denied*, 66 U.S.L.W. 3490 (U.S. Jan. 27, 1998), and because patronage dismissals implicate substantial First Amendment interests, this case merits plenary review.

I. THE SECOND CIRCUIT'S ANALYSIS CONFLICTS WITH THE RULINGS OF THIS COURT AND SUBSTANTIALLY UNDERMINES THE FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES.

In a line of cases decided over the past two decades, this Court has curtailed substantially the power of elected officials to base employment decisions, including dismissals, on political affiliation. *See Elrod v. Burns*, 427 U.S. 347 (1976) (plurality) (holding that First Amendment protects public employees from being fired solely on account of political affiliation); *Branti v. Finkel*, 445 U.S. 507 (1980) (same as applied to attorneys serving as assistant public defenders); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (extending *Elrod-Branti* protections to promotions, transfers, recalls after layoffs, and hiring); *O'Hare Truck Service, Inc. v. Northlake*, 518 U.S. 712 (1996) (extending *Elrod-Branti* protections to private contractors).

Of course this Court has not barred all patronage dismissals. As was noted in *Elrod,* government officials have a legitimate interest in being able to implement their policies, which the plurality observed were "presumably sanctioned by the electorate." 427 U.S. at 367. Nonetheless, the Court has emphasized that the exception to the *Elrod-Branti* rule is a narrow one.

In *Elrod,* for instance, the plurality opinion indicated that "policymaking" employees could be dismissed on account of political affiliation. *See* 427 U.S. at 367. In *Branti*, however, the full Court narrowed the exception considerably, stating that an employee could not be dismissed simply because he or she was employed in what might be characterized as a "policymaking" or "confidential" position. In doing so, the Court eschewed reliance on the categorization or labeling of positions and adopted instead a functional approach. According to the Court,

> the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

445 U.S. at 518. And the examples cited by the Court illustrate how close the fit must be between the employee's duties and partisan considerations. For instance, the Court noted that "if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration." *Id.* Conversely, "[t]he coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make

better coaches than Democrats, or vice versa, no matter which party is in control of the state government." *Id.*

The narrowness of the exception the Court allowed in *Elrod* and *Branti* is underscored by the facts in those cases. In *Elrod*, one of the plaintiffs was a high-level official, serving as the Chief Deputy of the Process Division of the Sheriff's Office and having supervisory responsibility for all of the office's departments working on a particular floor, *see* 427 U.S. at 350-51; all of the four plaintiffs were exempt from civil-service protections, *see id.* at 350. As for *Branti*, the government attorneys there had broad responsibility with respect to particular cases that were assigned to them but had

> very limited, if any, responsibility with respect to the overall operation of the public defender's office. They did not act as advisors or formulate plans for the implementation of the broad goals of the office and, although they made decisions in the context of specific cases, they d[id] not make decisions about the orientation and operation of the office in which they work[ed].

445 U.S. at 511 (citation and internal quotations omitted). The Court held that none of these plaintiffs could be fired because of their political affiliation.

Elrod and *Branti* thus establish that the state bears a heavy burden in justifying a patronage dismissal of a government employee and can meet this burden only by demonstrating a direct connection between the employee's responsibilities and legitimate partisan considerations. The "ultimate inquiry" is not whether the position can be labeled in a particular manner -- "policymaker," "confidential employee," "supervisor" or "civil service exempt"-- but

rather requires a more discriminating consideration of whether the particular responsibilities of the position are such that "party affiliation is an appropriate requirement for the effective performance of the public office involved."

In contrast to this Court's functional approach, the Second Circuit has adopted its own analytic framework, which ignores these clear and important directives and which eliminates many of the First Amendment protections decreed by this Court. Indeed, the Court of Appeals' approach allows public employees to be fired without any inquiry into the relationship between their positions and legitimate partisan considerations.

In its analysis of the petitioners' claims the Second Circuit started from the premise that *Branti* stands for "the proposition that 'political affiliation is an appropriate [job] requirement when there is a rational connection between shared ideology and job performance.'" App. at A8 (quoting *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988) (emendation in original). Then, without discussion of which party bore the burden of establishing such a "rational connection," the court pointed to four attributes of the petitioners' positions, as revealed only by written job descriptions in the record. With respect to these attributes, the court first noted, "Both positions are exempt from New York State's civil service laws, a factor which has been considered important by this circuit." App. at A9 (internal quotation and citation omitted). Second, the court found "no difficulty concluding that successful prosecution of professional misconduct charges requires considerable technical competence and expertise." *Id.* (internal quotations omitted). Third, with respect to Mr. Bavaro, the court observed that he had supervisory responsibility for Assistant Counsels and Senior Attorneys in the Bureau. *See id.* at A10. Finally, the court stated that, "although Associate and

Assistant Counsels are not empowered to speak directly on behalf of an elected official, they represent the state in [administrative] proceedings . . . and must therefore reflect the views of policymakers . . . ." *Id.*

The Second Circuit erred in its legal analysis by substantially diluting the doctrinal standard by which patronage dismissals must be evaluated -- converting this Court's "appropriate requirement" test into a far more lenient "rational connection" standard -- and by failing to place the burden of justifying dismissals squarely on the government defendants. Most serious, however, was the court's failure to undertake the essential *Elrod-Branti* inquiry: determining whether the specific nature of the petitioners' responsibilities were such as to demonstrate that political affiliation in fact was an appropriate requirement for their jobs.

Nowhere in its opinion did the Court of Appeals undertake this inquiry. Rather, it relied upon job attributes -- such as being civil-service exempt or requiring technical expertise -- that the Second Circuit employs as proxies to make positions subject to patronage dismissals. This reliance on general labels or characterizations of jobs, however, is precisely the methodology that this Court rejected in *Branti* when it declared it inappropriate for a lower court to sustain a patronage dismissal simply because an employee could be labeled as a "policymaker" or "confidential" employee. Rather, this Court has emphasized that the lower courts must examine the employees' actual job responsibilities, noting in *Elrod*, "The nature of the responsibilities is critical." 427 U.S. at 367.

The wisdom of this admonition is apparent when one examines the proxies upon which the Second Circuit relied in this case. For instance, the Court of Appeals weighed against both plaintiffs the fact that their jobs entailed

"technical competence and expertise." App. at A9 ("We have no difficulty concluding that successful prosecution of professional medical misconduct charges requires considerable 'technical competence and expertise.'"). While Mr. Bavaro and Ms. Hogan unquestionably possessed a specific set of skills as litigators, that alone tells one nothing about the relevance of political affiliation to their jobs. Moreover, "technical competence and expertise" is a label that can be applied to a vast number of government positions that have absolutely nothing to do with political considerations. In the absence of a showing that a public employee's technical expertise relates to legitimate partisan considerations, this factor cannot be a basis for permitting the employee to be fired because of his or her political affiliation. Yet, nothing in the Second Circuit's decision even discusses, much less demonstrates, that the petitioners' technical expertise bore any relationship to political affiliation.

The lower court's indiscriminating invocation of the fact that Mr. Bavaro had supervisory responsibility encounters the same problem. *See* App. at A10 (noting that those in his position "oversee Assistant Counsels and Senior Attorneys"). No relationship necessarily exists between the existence of supervisory responsibility and legitimate partisan considerations. Indeed, in *Elrod* the Court noted that supervisory employees cannot be subject to patronage dismissals if their supervisory responsibilities "have only limited and well-defined objectives," 427 U.S. at 368, and one of the successful plaintiffs in *Elrod* "supervised all departments of the Sheriff's Office working on the seventh floor of the building housing that office," *see id.* at 350-51. In this case, however, the Second Circuit relied simply upon the existence of general supervisory responsibility without any examination of the relevance of that job attribute to partisan affiliation. If this approach were accepted, a

substantial number of public employees would be subject to patronage dismissals, which *Branti* seems to foreclose.

The third proxy upon which the Second Circuit relied was that both Mr. Bavaro and Ms. Hogan were exempt from civil-service protections, a factor on which the court placed substantial weight. *See* App. at A9. Yet all of the plaintiffs in *Elrod* were exempt from civil service, *see* 427 U.S. at 350, suggesting that this cannot be a significant factor in assessing the relevance of political affiliation to a job. Indeed, to accord much significance to this factor would eviscerate *Elrod* and *Branti*, for it will be those persons who are exempt from civil-service protections who will need to avail themselves of their First Amendment rights in order to prevent a politically-based dismissal. In the absence of a showing that a position is exempt from civil service for reasons that are legitimately related to valid partisan considerations, this label is no more meaningful than the labels "policymaker" or "confidential employee." The respondents made no such showing.[1]

The final factor upon which the Second Circuit relied was the suggestion that the work of Mr. Bavaro and Ms. Hogan reflected the views of policymakers. Specifically, the Court of Appeals observed, "[A]lthough Associate and Assistant Counsels are not empowered to speak directly on behalf of an elected official, they represent the State in

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[1]Earlier in its decision, the lower court did assert that these positions had been converted to exempt status because those occupying the positions "must be able to reflect the views of Counsel and the Health Commissioner in oral appearance." App. at A6 (internal quotations and emendation omitted). As noted below, however, the simple fact that a public employee must be able "to reflect the views" of policymakers does not advance the inquiry into the relevance of political affiliation to that employee's job duties.

proceedings before the Board [of Professional Medical Conduct] and must therefore reflect the views of policymakers in their dealings with the Board and with the physicians whom they prosecute." App. at A10. This reasoning is flawed for two reasons.

First, while the lower court is correct in noting that these attorneys represented the state while the attorneys in *Branti* represented only individual clients and therefore that the work of Mr. Bavaro and Ms. Hogan in fact may have reflected or implemented the views of policymakers, *see* App. at A11-12, that alone cannot justify exempting them from the *Elrod-Branti* protections. This Court already has ruled that the fact that an employee is a policymaker is not sufficient to justify a patronage dismissal of the employee; consequently, it necessarily is inappropriate to uphold dismissals of public employees simply because their work reflects the views of policymakers.

More substantively, while political affiliation may be an appropriate requirement for some high-level jobs in which government employees are required to translate broad political decisions into government action, that cannot mean that every public employee whose duties "reflect and implement the views of policymakers" can be fired on account of their political affiliation. By that reasoning, every paralegal, investigator, and administrative support person working on medical misconduct prosecutions also could be fired. Or, to use an example from a different context, by this reasoning a policy decision by the parks department to make park cleanup the department's top priority would mean that every park worker picking up trash could be fired for political reasons. This approach knows no bounds and is

untenable.[2]

None of this is to suggest that employees who have technical expertise, who have supervisory responsibility, who are exempt from civil-service protections, or whose work reflects the views of policymakers necessarily are immune from patronage dismissals. *Branti* and *Elrod* establish, however, that such attributes alone, like the labels "policymaker" or "confidential employee," cannot be a basis for upholding such dismissals. Rather, the government must demonstrate that some particular facet of these job attributes relates to partisan affiliation before a court can uphold a patronage dismissal.

The error in the Second Circuit's approach is apparent in this case, which involves two middle-level government employees who were attorneys with limited and well-defined sets of responsibilities in administrative proceedings, played no role in selecting cases to be prosecuted, had no authority to speak publicly on behalf of

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[2]For the same reasons, the fact that the job description of Associate Counsels like Mr. Bavaro provide that persons in such positions were to determine litigation strategy in administrative proceedings "while taking into account . . . impact on public policy" cannot, without more, remove those positions from the ambit of the First Amendment. *See* App. at A11. If being a policymaker is insufficient to exempt one from the protections of *Branti*, having a position in which one must simply take policy into account while doing routine tasks cannot be sufficient.

Similarly, the fact that petitioners' job descriptions provided that they "would advise Department of Health program staff on aspects of Professional Medical Conduct," *see* App. at A11, does not provide any additional justification for the petitioners' dismissal without a demonstration of the relevance of this role to legitimate political considerations. To suggest otherwise would be tantamount to endorsing a rule that every attorney working on behalf of the government could be dismissed on account of political affiliation, which *Branti* seems to foreclose.

their agency, and had no authority to provide legal advice or counsel to elected officials. *See infra* at 3-5 (reviewing record facts concerning petitioners' job responsibilities). Like the government attorneys in *Branti*, Mr. Bavaro and Ms. Hogan had "very limited, if any, responsibility with respect to the overall operation of the . . . office." 445 U.S. at 511. Nonetheless, without identifying any aspect of their positions or their responsibilities that suggested that "party affiliation is an appropriate requirement for the effective performance of the public office involved," as *Branti* requires, the lower court endorsed the political firings of Mr. Bavaro and Ms. Hogan.

Simply put, the Second Circuit has adopted an analysis that loses sight of this Court's teachings in *Branti* and *Elrod*. Given the test employed by the Second Circuit, the large number of public employees who have supervisory responsibility or who have technical expertise or who are civil-service exempt or whose work reflects the views of policymakers can be fired simply for exercising their First Amendment right of political affiliation, regardless of whether their positions bear any meaningful relationship to legitimate political considerations. Such a sweeping exception to the First Amendment cannot be squared with *Elrod* and *Branti*.

II. THE COURTS OF APPEALS HAVE ISSUED CONFUSING AND CONFLICTING DECISIONS INTERPRETING AND APPLYING THIS COURT'S RULINGS IN *ELROD* AND *BRANTI*.

The Second Circuit is not alone is misinterpreting this Court's First Amendment patronage-dismissal jurisprudence. As the full Fourth Circuit recently observed, "Over the last two decades, the United States Supreme Court has issued four significant opinions on [the issue of dismissing public employees because of political affiliation]. Despite the Court's guidance, lower courts have issued 'conflicting and confusing' opinions.'" *Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (*en banc*) (quoting *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)), *cert. denied*, 66 U.S.L.W. 3490 (U.S. Jan. 27, 1998). The matters about which the lower courts have issued these conflicting and confusing opinions relate directly to the issues presented by this petition.

For instance in the *en banc* decision from the Fourth Circuit, the majority of eight judges concluded that all deputy sheriffs in North Carolina were subject to patronage dismissals. *See Jenkins*, 119 F.3d at 1160-65. Four dissenting judges vigorously opposed this holding, arguing that the majority wrongly had relied upon generalizations about employee positions that had little or no bearing on whether political affiliation was necessary to assure effective discharge of a public employee's job duties. As the dissenters explained,

> The majority fundamentally errs in its *Elrod-Branti* analysis. It fails to engage in a particularized examination of the actual duties of each deputy to determine whether [the

> Sheriff] has met the burden of showing that party affiliation is an acceptable job requirement, an analysis required under *Elrod* and *Branti*. The majority also totally disregards the Supreme Court's teachings as to what sort of duties may permit a public employer to make political affiliation a job requirement.

119 F.3d at 1165-66. In this vein the dissenters objected to the majority's holding that a public employee can be dismissed on account of political affiliation if their position "resembles a policymaker, a communicator, or a privy to confidential information." *Id.* at 1166 (internal quotations omitted). According to the dissenters, "This holding flies in the face of the Supreme Court's teaching that party affiliation is *not* necessarily relevant to every policymaking or confidential position." *Id.* (emphasis in original, internal quotations omitted).

It also echoes the error of the Second Circuit, which in this case likewise relied upon general characterizations of the petitioners' jobs without any effort to determine the relationship between those characteristics and the necessity of political affiliation to the effective discharge of their job duties. That, however, is the "ultimate inquiry" that this Court mandated in *Branti*.

Beyond this fundamental problem, the lower courts have divided on the relevance of specific job attributes to political affiliation as well as on the weight to be assigned to those attributes. Thus, consistent with the approach it took in this case, the Second Circuit has held that the fact that a public employee has a high salary is a basis for concluding that he or she can be dismissed on account of political affiliation without any consideration of whether the salary

level somehow relates to the necessity for political affiliation, *see Savage v. Gorski*, 850 F.2d 64, 68-69 (2d Cir. 1988); the Eleventh Circuit, however, has rejected reliance upon the existence of a high salary as bearing on the relationship between political affiliation and effective job performance, *see Parrish v. Nickolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3766 (U.S. May 19, 1997).

Similarly, the Second and Fourth Circuits have split on the issue of whether the courts should presume that a civil-service exempt employee is subject to a patronage dismissal. *Compare Gordon v. County of Rockland*, 110 F.2d 886, 890 (2d Cir. 1997) (rejecting presumption), *cert. denied*, 66 U.S.L.W. 3255 (U.S. Oct. 6, 1997) *with Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990) (adopting presumption). Additionally, the Eleventh Circuit has split from the First and Seventh Circuits on the issue of whether policymakers can be dismissed on account of political affiliation when their policymaking responsibilities do not directly implicate partisan political concerns. *See Parrish*, 86 F.3d at 1093 (discussing split).

Finally, the Courts of Appeals have even been inconsistent on the issue of who bears the burden in patronage-dismissal cases. Thus, notwithstanding this Court's directive in *Branti* that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement," the Second Circuit in this case placed no burden on the respondents to demonstrate the relevance of political affiliation to the petitioners' job duties, and the dissenters in *Jenkins* pointed out that the majority in that Fourth Circuit *en banc* decision did not require the firing official "to bear any burden." 119 F.3d at 1166 (internal quotation omitted). By contrast, the Eleventh Circuit recently vacated a district court judgment in favor of a firing

official because the "district court did not address how [the firing official] met his burden" of demonstrating the relevance of party affiliation. *See Parrish*, 86 F.2d at 1093.

The confusion in the lower courts about the interpretation and application of this Court's patronage-dismissal jurisprudence is resulting not only in inconsistent and erroneous outcomes, but it also is foreclosing legitimate damage claims against officials. For instance, the Eleventh Circuit in *Parrish v. Nickolits* reversed a district court holding that the plaintiffs there could be dismissed because of their political affiliation but nonetheless rejected the plaintiffs' damage claim, noting that "the plaintiffs' argument that the law was clearly established by *Elrod* and *Branti* is further undermined by the split of the circuits concerning what those two decisions mean." 86 F.3d at 1094.

CONCLUSION

For all the foregoing reasons, the petitioners seek a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit in this matter.

Respectfully submitted,

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March 16, 1998

APPENDIX

UNITED STATES COURT OF APPEALS
For The Second Circuit

Nos. 227, 917 August Term, 1997

(Argued: October 8, 1997) Decided: NOV 21 1997

Docket Nos. 96-9181, 97-159

RALPH J. BAVARO; ELIZABETH C. HOGAN
Plaintiffs-Appellants,

v.

GEORGE E. PATAKI, individually, and as Governor of the State of New York; JAMES G. NATOLI, individually, and as Director of the State Operations of the State of New York; BARBARA ANN DEBUONO, individually, and as Commissioner of the New York State Department of Health; KAREN SCHIMKE, individually, and as Executive Deputy Commissioner of the New York State Department of Health; JERRY JASINSKI, individually, and as Acting General Counsel of the New York State Department of Health; STATE OF NEW YORK; DEPARTMENT OF HEALTH,
Defendants-Appellees.

Before: KEARSE, CABRANES, Circuit Judge, and CHIN, District Judge.*

Appeal from orders of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*) denying plaintiffs' motions for summary judgment, granting defendants' motions for summary judgment, and

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* The Honorable Denny Chin of the United States District Court for the Southern District of New York, sitting by designation.

dismissing plaintiffs' suits, filed under 42 U.S.C. §1983, alleging that they were removed from their positions as attorneys at the New York State Bureau of Professional Medical Misconduct on the basis of political affiliation, in violation of the First Amendment to the United States Constitution.

Affirmed.

RICHARD C. HAMBURGER, Melville, New York (David N. Yaffe, Lane T. Maxson, of counsel), *for Plaintiffs-Appellants.*

LISA LECOURS, Assistant Attorney General for the State of New York, Albany, New York (Dennis C. Vacco, Attorney General for the State of New York; Peter H. Schiff, Deputy Solicitor General, Nancy A. Spiegel, Assistant Attorney General, of counsel), *for Defendants-Appellees.*

Christopher Dunn, Arthur Eisenberg, Norman Siegel, New York, New York *for Amicus Curiae New York Civil Liberties Union.*

JOSE A. CABRANES, *Circuit Judge:*

In this appeal, we are asked to whether the positions of Associate Counsel and Assistant Counsel in the New York State Department of Health, Divisions of Legal Affairs, Bureau of Professional Medical Misconduct ("Bureau"), are subject to dismissal on the basis of political affiliation, or whether instead they are protected against such political

patronage dismissals under the First Amendment to the United States Constitution.

Plaintiffs-appellants Ralph Bavaro and Elizabeth Hogan, who were employed as Associate and Assistant Counsels, respectively, until they were fired on April 7, 1995 to "make room" for political appointees of defendant-appellee George E. Pataki, Governor of New York, filed separate actions seeking damages and injunctive relief pursuant to 42 U.S.C. § 1983. They each alleged that their dismissals violated the First Amendment. Plaintiffs and defendants in both actions filed cross-motions for summary judgment. The United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*) granted summary judgment in favor of defendants in both actions, holding that the positions of Associate and Assistant Counsel are not entitled to First Amendment protection against patronage dismissal.[1] Because we agree with the district court that, under controlling precedents, these positions entail duties that make First Amendment protection unavailable, we affirm.[2]

I.

Ralph Bavaro served as an Associate Counsel at the Bureau from 1984 to 1989, and returned to the Bureau in the same position in 1992. Elizabeth Hogan was appointed as a Bureau Assistant Counsel on April 20, 1994. Both were dismissed after the election of Governor Pataki, and there is no dispute among the parties that political affiliation was the basis for their dismissal. Specifically, for purpose of this appeal, defendants concede that plaintiffs were dismissed in order to

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[1] The Bavaro and Hogan actions were consolidated for purposes of this appeal.

[2] In light of our holding that no First Amendment violation occurred, we need not address defendants' claim to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

permit the appointment of new counsel by the incoming administration.[3] We therefore confine our inquiry to whether plaintiffs were protected by the First Amendment against dismissal on that basis.

The Bureau is responsible for prosecuting charges of professional Misconduct brought against physicians and their assistants in disciplinary hearings before the Board of Professional Medical Misconduct ("Board"). *See* N.Y. Pub. Health Law § 230 (McKinney 1997).

Grounds for misconduct charges range from gross negligence and incompetence to harassment, sexual abuse, race discrimination and drug or alcohol abuse. *See* N.Y. Educ. Law § 6530 (McKinney 1997). The chain of events leading to a disciplinary proceeding before the Board begins with an investigation by the Office of Medical Misconduct ("Office"). *See* N.Y. Pub. Health Law § 230(10)(a)(i). Those cases that are not resolved at this stage are reported to an Office screening committee, which makes a recommendation as to whether charges should be filed. If the Director of the Office determines that a hearing is warranted, he or she directs the Bureau to prepare charges. *See id.* § 230 (10)(a) (iii)-(iv).

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[3] Defendants argued before the district court that plaintiffs were not singled out for dismissal because of their individual political affiliations, but rather, that they were randomly dismissed to "make room" for political appointees, and this does not constitute discrimination on the basis of political affiliation as a matter of law. The district court rejected this position, holding that it relies on a "distinction without a difference." *Hogan v. Pataki*, 953 F.Supp. 22, 26 (N.D.N.Y. 1997) (citing *Bennis v. Gable*, 823 F.2d 723, 731-32 (3rd Cir. 1987) (holding that dismissal of a state employee to "make room" for political appointees can be viewed as penalizing the dismissed employee for a "failure to support" the incumbent administration)). Because for purposes of this appeal defendants now concede that they discriminated on the basis of political affiliation, we express no view on this aspect of the district court's ruling.

The case is then assigned to an Associate or Assistant Counsel, who drafts the charges, but is not authorized to sign them. Once charges have been filed, it is the job of the designated Associate or Assistant Council to prosecute the State's case before the Board.

The record contains three job descriptions defining the responsibilities of the Associate and Assistant Counsels. While these job descriptions are not in conflict with one another, neither are they identical, and some are more detailed than others. The parties, however, appear to agree that the job descriptions are all equally valid, and that none was meant to supersede the others.

According to the more detailed of these descriptions, the Associate Counsel is principally expected

> to prepare and present the [Office's] case against a physician in hearing ... [d]etermine litigation strategy for each case, taking into account the quality of the investigative work, impact on public policy, impact on patients and tactics of opposing Counsel .... [p]resent cogent oral opening and closing statements summarizing the State's case; introduce and present evidence necessary to prove the charges as well as oppose the respondents' arguments by appropriate objection, cross-examination and oral argument .... draft statement of charges .... [p]repare written briefs and proposed findings of fact, and conclusions .... [a]ssist in supervising and directing the work of Assistant Counsel and, as necessary, Senior Attorneys .... [a]dvise Department of Health program staff [on] aspects of Professional Medical Conduct .... [perform] other related duties.

The Assistant Counsel's job description largely accords with that of the Associate Counsel, except that the Assistant Counsel is said to assist in the development of litigation strategy only "in the more routine cases," and, unlike the Associate Counsel, does not supervise other attorneys.

It is undisputed that both the Associate Counsel and Assistant Counsel positions are classified as "exempt" from protection under New York State's civil service system.[4] The record indicates that these positions were originally non-exempt, but were re-classified in 1982 by the New York State Civil Service Commission ("Commission") at the urging of the Department of Health ("Department"). In a September 22, 1992, letter to the President of the Commission, seeking re-classification to exempt status, the Department explained that Associate and Assistant Counsels "must be able to reflect the views of the Counsel and the [Health] Commissioner in oral appearances ... and demonstrate the utmost discretion in handling these cases. To insure that the Commissioner's views are appropriately reflected, the agency needs maximum flexibility in reelection, retention and remuneration."

II.

We review the district court's orders granting summary judgment *de novo*. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Scaria v. Rubin*, 117 F.3d 652, 653 (2nd Cir. 1997) (per curiam).

The parties do not argue, and we do not find, that there are genuine issues of material fact to be tried. Rather, the parties dispute whether the positions of Associate and

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[4] Under New York law, certain state employees are classified as "exempt" from the civil service laws' protection against dismissal. *See* N.Y. Civ. Serv. Law §§ 41, 75 (McKinney 1997).

Assistant Counsel are protected against political patronage dismissals as a matter of law.

The Supreme Court first recognized the principle that patronage dismissals may infringe upon government employees' First Amendment rights to political belief and association in the plurality opinion of Justice Brennan in *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (plurality opinion). The plurality in *Elrod* also acknowledged the need of a newly elected administration for political loyalty among at least some of its employees "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. The plurality concluded that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this government end," while conceding that "[n]o clear line can be drawn between policymaking and nonpolicy making positions." *Id.*

Subsequently, in *Branti v. Finkel*, 445 U.S. (1980), a majority of the Court reaffirmed that patronage dismissals may contravene the First Amendment. *Id.* At 517. However, the Court refined the *Elrod* plurality's test for distinguishing between positions that are protected against patronage dismissals and those that are not. "In sum, the ultimate inquiry is not whether the label 'policymaker' ... fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. As the *Branti* Court observed, political affiliation is not always relevant even to the job of a policymaker. *Id.* ("The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa ....").

In *Branti*, two Assistant Public Defenders brought suit alleging that a newly appointed Democratic Public Defender

was about to dismiss them solely because they were Republicans. *Id.* at 509-10. The Court held that an Assistant Public Defender could not be dismissed based on political affiliation because "[t]he primary, if not the only, responsibility of an [A]ssistant [P]ublic [D]efender is to represent individual citizens in controversy with the State .... his duty is not to the public at large." *Id.* at 519 (internal quotation marks and citation omitted). In a suggestive footnote, the Court added that "[t]his is in contrast to the broader public responsibilities of an official such as a prosecutor," although it "express[ed] no opinion" as to whether a prosecutor's deputy would be subject to patronage dismissal. *Id.* at n.13.

We have understood *Branti* as standing for the proposition that "political affiliation is an appropriate [job] requirement when there is a rational connection between shared ideology and job performance." *Savage v. Gorski*, 850 F.2d 64, 68 (2nd Cir. 1988). In determining whether a government employee's position is protected under this standard, we look primarily to the "inherent duties of the position," *Grodon v. County of Rockland*, 110 F.3d 886, 888 (2nd Cir. 1997) (internal quotation marks and citation omitted), not the actual duties performed by the employee in a particular case. "Our analysis of the inherent duties ... focuses on the job description of that position." *Vona v. County of Niagara*, 119 F.3d 201, 207 (2nd Cir. 1997); *see Gordon*, 110 F.3d at 888 ("The idea that job performance (rather than job description) should control *Elrod-Branti* analysis has been consistently rejected by this court and others.").

In determining whether a "rational connection" exists between political affiliation and performance of the inherent duties of a position, we have looked to several factors, including whether the employee: "(1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) control others," *Vezzetti v. Pellegrini*, 22 F.2d 483, 486 (2nd Cir. 1994), and (4) "is empowered to act and

speak on behalf of a policymaker, especially an elected official," *Gordon*, 110 F.3d at 890 (summarizing other factors addressed in *Vezzetti).* These factors "should not be mechanically applied, nor should [they] begin and end the analysis." *Id.*

Application of these factors in the instant case suggests that the positions of Associate and Assistant Counsel are not protected against a patronage dismissal. Both positions are exempt from New York State's civil service laws, a factor "which has been considered important by this circuit," *Gordon*, 110 F.3d at 890. *See Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993) ("New York has considered many of the same criteria for non-civil service status as does a court in determining whether a position is exempt from First Amendment protection."). We have emphasized that although we will not presume that positions defined as "exempt" from civil service protection are necessarily exempt from First Amendment protection, *see Gordon*, 110 F.3d at 890 n.5, interests of federalism and conservation of judicial resources counsel "substantial deference to the state's judgment where government positions are so defined," *Savage*, 850 F.2d at 69.[5]

We also have no difficulty concluding that successful prosecution of professional medical misconduct charges requires considerable "technical competence and expertise."

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[5] In *Savage*, we further observed that

> [o]therwise, federal courts will be embroiled in determining at each change of state or local administration which positions are appropriately within the political patronage system. Such a determination not only creates the possibility of a super-civil service overseen by the courts, but allows the federal judiciary to intrude undesirably into the very structure of state and local governments.

850 F.2d at 69.

The third factor ("control over others") weighs against First Amendment protection for Associate Counsels, who oversee Assistant Counsels and Senior Attorneys, but in favor of protection for Assistant Counsels, who apparently have no supervisory responsibilities over other attorneys. Finally, although Associate and Assistant Counsels are not empowered to speak directly on behalf of an elected official, they represent the State in proceeding before the Board, and must therefore reflect the views of policymakers in their dealings with the Board and with the physicians whom they prosecute. These factors, of course, are not "an exhaustive list of indicators, nor is any one factor or group of them always dispositive." *Vezzetti*, 22 F.3d at 486.

We also find instructive our recent decision in *Vona*. In that case, two Assistant Attorneys for the Niagara County Department of Social Services, both Republicans, were dismissed after the Democratic Party took control of the County Legislature. They claimed that their positions were protected under *Elrod*, *Branti* and their progeny. *See Vona*, 119 F.3d at 203. The job description for Assistant Attorneys in *Vona* was remarkably similar to the job descriptions for Assistant Counsels in the instant case.[6] The Assistant Attorneys handled "day-to-day court proceedings" in Family Court. *Id.* at 205. They were not responsible for the management of individual cases, did not supervise other staff,

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[6] The job description in *Vona* required that an Assistant Attorney

> assist[ ] the Social Services Attorney in conducting litigation, and performing legal research, assist[ ] and provid[e] legal counsel to the Social Services Department, assist [ ] in preparation of and representation at Fair Housing for the general public as clients, and do [ ] related work as necessary to assist in the functioning of the legal division of the Social Services Department.

Vona, 119 F.3d at 204.

and did not have regular contact with elected officials. *See id.* Even though we found that it was possible that they enjoyed civil service protection, *see id.* at 209, we held that they did not enjoy First Amendment protection against patronage dismissal, in part because their "broad duty of providing legal counsel to the Department and assisting the legal division ... may at times require [them] to be employed in a way that requires confidentiality of information encompassing political and ideological concerns." *Id.* at 208. We also observed that, unlike the Assistant Public Defenders in *Branti*, the Assistant Attorneys in *Vona* "represent[ed] the County rather than individual clients." *Id.*

In the instant case, Bureau Associate and Assistant Counsels "[a]dvise Department of Health program staff [on] aspects of Professional Medical Conduct," serving in much the same legal advisory capacity as did the Assistant Attorneys in *Vona*. We have elsewhere rejected those arguments that government attorneys may invoke First Amendment protection against patronage dismissal on the grounds that they "merely gave legal advice when requested to do so" and that their jobs were otherwise "politically neutral and technical in nature." *See Gordon*, 110 F.3d at 891. We believe that legal advice offered by Associate and Assistant Counsels to Department staff inherently implicates matters of policy and extends well beyond mere ministerial or "technical" duties.

Associate and Assistant Counsels also each "[d]etermine litigation strategy." Associate Counsels in particular are expressly charged with doing so while "taking into account ... impact on public policy." These prosecutorial duties necessarily entail "independent judgment regarding department policies and procedures." *Savage*, 850 F.2d at 69. Indeed, "[I]t is difficult to fathom how such responsibilities can be undertaken and done well without ... political or social philosophy [making] a difference." *Gordon*, 110 F.3d at 890 (internal quotation marks and citation omitted). We note as well that like the Assistant Attorneys in *Vona*, and unlike the

Assistant Public Defenders in *Branti*, the Associate and Assistant Counsels do not merely represent individual clients. Rather, they represent the State and must therefore reflect and implement the views of policymakers in prosecuting professional medical misconduct cases that may often be the source of public controversy.

In sum, our review of the "inherent duties" of Associate and Assistant Counsels persuades us that there is a "rational connection between shared ideology and job performance," so that "political affiliation is an appropriate [job] requirement" of these positions. *See Savage*, 850 F.2d at 68. We therefore hold that these positions do not enjoy First Amendment protection from dismissal on the basis of political affiliation.

Accordingly, the district court's orders granting summary judgment for defendants are affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ELIZABETH C. HOGAN,

Plaintiff, 96-CV-551

against

GEORGE E. PATAKI, individually, and as Governor of the State of New York; JAMES G. NATOLI, individually, and as Director of the State Operations of the State of New York; BARBARA ANN DDEBUONO, individually, and Commissioner of the New York State Department of Health; KAREN SCHIMKE, individually, and as Executive Deputy Commissioner of the New York State Department of Health; JERRY JASINSKI, individually, and as Acting General Counsel of the New York State Department of Health; STATE OF NEW YORK; DEPARTMENT OF HEALTH,

Defendants.

APPEARANCES:	OF COUNSEL:
RICHARD HAMBURGER, P.C. 225 Broadhollow Road Melville, NY 11747 *For Plaintiff*	RICHARD C. HAMBURGER, Esq.
OFFICE OF THE ATTORNEY GENERAL Department of Law The Capitol Albany, New York 12224 *For Defendants*	DARREN O'CONNOR, A.A.G

I. Background

This case arises from the discharge of Plaintiff Elizabeth Hogan from her position as Assistant Counsel in the Bureau of Professional Medical Conduct at the New York State Department of Health. Hogan asserts, and defendants do not deny, that the reason for her discharge in April, 1995, was to free up positions within the Department of Health to make them available for Pataki Administration appointees. What is in dispute, however, is whether Hogan's termination infringed on her First Amendment rights under the United States Constitution.

The New York State Department of Health ("DOH") hired Hogan as an Assistant Counsel in the Department's Bureau of Professional Medical Conduct ("Bureau"). The Bureau is responsible for prosecuting charges of professional misconduct brought against physicians, physician's assistants, and specialist's assistants in New York. Such misconduct can include fraud, gross negligence and incompetence, sexual abuse, drug-or-alcohol-induced misbehavior, moral unfitness and harassment or intimidation. Bureau attorneys are prosecutors, and they generally possess strong litigation skills and a thorough knowledge of medical procedures and practices.

Prior to working for the Bureau, Hogan worked as an Assistant District Attorney for the County of Albany. In March, 1994, Hogan was appointed as an Assistant Counsel with the Bureau. Her position was classified as "exempt" such that she did not have to sit for a competitive exam and she was not protected from termination by the Civil Service Law. *See* N.Y. Civ. Serv. Law §§ 41 & 75. Furthermore, Hogan's job was relatively high-paying, her annual salary in early 1995 was $53,428, well above the $36,300 average salary of DOH employees.

On or about April 7, 1995, Hogan was discharged from her position with the DOH. Defendants, members of the Pataki administration, state that Hogan, as an exempt worker, was chosen for firing at random to make room for Pataki appointees.

II. DISCUSSION

In their motion for summary judgment, defendants argue that Bureau attorneys, like Hogan, are among the "policy making" and "confidential" employees who can be discharged for political reasons. According to defendants, Bureau attorneys represent the Director of the Office of Professional Medical Conduct, the DOH and the public in general.

In the alternative, defendants move for summary judgment based on qualified immunity. Because no clearly established law of which a reasonable state official would be aware prevented them from discharging Hogan for political reasons, the individual defendants contend that they cannot be held liable for damages under 42 U.S.C. § 1983. Defendants also argue that once Hogan's federal cause of action is dismissed, the Court should decline to exercise jurisdiction over her state law claims. Finally, they argue that the Complaint should be dismissed on this basis insofar as it seeks monetary relief against the State of New York and the other defendants in their official capacities, it is barred by the Eleventh Amendment.

In support of her cross-motion and in opposition to Defendants' motion, Hogan asserts that because there is no rational connection between her political ideology and the performance of her job, her firing was in violation of the First Amendment. Hogan claims that her responsibilities were well-defined and essentially limited to the administrative act of prosecuting doctors. She also argues that she did not decide which physicians to charge; could not settle cases without the consent of her superiors; had no authority to formulate policy;

and did not function as a legal advisor to any person in a policy making position. In sum, Hogan sees herself as a relatively low-level attorney with little power, far removed from the political appointees who run the DOH.

A. Summary Judgment Standard

Pursuant to Fed. R. Civ. R. 56(c), a court may grant summary judgment if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Furthermore, it is the substantive law that will determine what facts are material to the outcome of a case. *See Anderson*, 477 U.S. at 250.

Initially, the moving party has the burden of informing the court of the basis of its motion. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, the burden then shifts to the non-moving satisfies its burden, the burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The Court must then resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). However, the non-moving party must do more than simply show "that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Only when the Court concludes that no rational finder of fact can find in favor of the non-moving party should summary judgment be granted. *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1223 (2d Cir. 1994).

B. Qualified Immunity

The court will examine the issue of qualified immunity first; if qualified immunity attaches in this instance, this may obviate the need for this court to delineate the precise contours

of the constitutional rights at issue here. Indeed, the Supreme Court has emphasized the importance of resolving the issue of qualified immunity early in a proceeding. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (noting that whether qualified immunity is applicable is a question of law, not fact, for the trial judge to resolve long before trial).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court articulated the test that still controls today: "[G]overnment officials performing discretionary functions ... generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818; *see also Williams v. Smith*, 781 F.2d 319, 322 (2nd Cir. 1986) ("Once qualified immunity is pleaded, plaintiff's complaint will be dismissed unless defendant's alleged conduct, when committed, violated 'clearly established statutory or constitutional rights of which a reasonable person would have know.'") (*quoting Harlow*, 457 U.S. at 815).

In determining whether a particular right was clearly established, courts in this circuit consider three factors: "(1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful." *Jermosen v. Smith*, 945 F.2d 547, 550 (2nd Cir. 1991); *see also Prue v. City of Syracuse*, 26 F.3d 14 (2nd Cir. 1994). Moreover, qualified immunity protects a defendant even where the right in question was clearly established if it was objectively reasonable for the defendant to believe the acts did not violate that right. *See Benitez v. Wolff*, 985 F.2d 662 (2nd Cir. 1993).

Analyzing the facts and law at issue here, the Court is inclined to conclude that the individually named defendants' conduct did not violate clearly established statutory or

constitutional rights of which a reasonable person would have known. Indeed, in a case remarkably similar to the one at bar, this Court determined that these same defendants did not violate a "clearly established statutory or constitutional right" in firing an Assistant Counsel at the Bureau of Professional Medical Conduct. *See Bavaro v. Pataki,* 96-CV-121 (N.D.N.Y. 1996) (Decision of June 10, 1996).

In *Bavaro*, this Court granted Defendants' Motion for Summary Judgment and held that the actions of these same defendants

> did in fact comport with the First and Fourteenth Amendments, so it follows that a reasonable state officer could have believed that the firing did not violate plaintiff's constitutional rights. However, even if plaintiff eventually was found to be protected from political termination by the First and Fourteenth Amendments, the Court believes that the law is sufficiently murky or the factual question is sufficiently close that a reasonable state officer could still believe that plaintiff's firing was permissible under the Constitution.

Transcript of June 10, 1996 Decision at 23.

In fact, there appears to be few distinguishing characteristics between the *Bavaro* case and this case. Both Elizabeth Hogan and Ralph Bavaro were fired on April 7, 1995, to create openings for persons of the Pataki administration's owning choosing. Plaintiffs in both cases challenge the constitutionality of the firings under the First Amendment. The only apparent dissimilarity between the two cases is that *Bavaro* worked as Associate Counsel and Hogan worked as Assistant Counsel in the Bureau; Associate Counsel are one level senior to Assistant Counsel.

With this distinction in mind, the Court will ascertain whether a different conclusion is necessitated here.

C. Hogan's First Amendment Claim

As a general rule, the dismissal of a public employee for political reasons infringes on the employee's constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 360 (1976); *Branti v. Finkel*, 445 U.S. 507, 514-15 (1980). On this issue, the Court agrees with Hogan that the distinction between firing her specifically because she is a Democrat and firing her at random to provide positions for Pataki supporters is a distinction without a difference. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (requiring political affiliation as substantial or motivating factor in defendants' decision to terminate employment). As stated by the Third Circuit, the problem with the alternative view is that "[termination] to make positions available for political supporters [in essence] reflects a failure to support [the new incumbent]." *Bennis v. Gable*, 823 F.2d 723, 731-32 (3d Cir. 1987).

Accordingly, Hogan has made out a *prima facie* case of dismissal on the basis of her political views. However, the protection afforded in *Elrod v. Burns* is not without limitation. More recent cases provide an exception under which "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. The Second Circuit has further clarified that "political affiliation is an appropriate requirement when there is a rational relation between shared ideology and job performance." *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988). As a result, if Hogan's position as Assistant Counsel in the Bureau of Professional Medical Conduct falls within the *Elrod-Branti* exception, Hogan does not have a constitutional claim.

The Second Circuit recently clarified the factors to be considered in assessing the applicability of the *Elrod-Branti* exception. These factors include:

> whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.

Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994); *Regan v. Boogertman*, 984 F.2d 577, 580 (2nd Cir. 1993). This list is not exhaustive, and no single factor or group is dispositive. Instead, all factors must be considered in their totality to determine whether a rational connection exists between shared ideology and job performance. *Vezzetti*, 22 F.3d at 486.

As this Court noted in its previous decision in *Bavaro*, the position of Bureau prosecutor involves many of the *Vezzitti* factors. First, as a Bureau prosecutor Hogan was exempt from civil service protection. Second, as an experienced litigator Hogan has technical competence and expertise. Third, Hogan is authorized to speak in the name of policymakers; nearly every statement Hogan made as a prosecutor was made in the name of her superiors, most of whom were policymakers, because Hogan was their representative. Fourth, Hogan is responsive to partisan politics and political leaders because Hogan must execute what are often political decisions (by actually prosecuting the doctors). Finally, Hogan earned a high salary in her position as Assistant Counsel. Although not included in the *Vezzetti* factors, a high salary typically is viewed as an additional common characteristic of jobs for which political affiliation is rationally related to job

performances. *See Savage*, 850 F.2d at 68; *Tranello v. Frey*, 758 F. Supp. 841, 847 (W.D.N.Y. 1991), *aff'd in part*, 962 F.2d 244 (2nd Cir. 1992).

On the other hand, some of the *Vezzetti* factors militate in favor of Plaintiff's position that political affiliation is not related to her job performance. First, Hogan did not have contact with elected officials. However, the relevance of this factor is somewhat diminished in that there are only four statewide elected officials in New York at the state level – the Governor, Lieutenant Governor, Comptroller, and Attorney General. Consequently, only a limited number of employees can have direct contact with them. As Defendants note: "Representative government would be dealt a crippling blow if an incoming administration were required to retain all exempt employees who do not have contact with one of these four individuals." (Defs' Mem. of Law at 17).

Second, and in contrast to the plaintiff in *Bavaro*, Hogan did not control others. However, the absence of supervisory responsibilities is a common characteristic of attorneys in general, and prosecutors in particular. Not surprisingly, this factor has not prevented courts from ruling against non-supervisory attorneys who claim that their discharges were politically motivated. *See e.g., Vona v. County of Niagara*, 1995 WL 222049 (W.D.N.Y. 1995); *Catterson v. Caso*, 472 F. Supp. 833, 838 (E.D.N.Y. 1979); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990).

Finally, the remaining two *Vezzetti* factors, whether Hogan was perceived as a policymaker by the public and whether she influenced government programs, are less clear. In analyzing the remaining factors, a court should not look merely at the actions of the employee while in office. Rather, it should "look at the power with which [the employee] is vested by law, and which is inherent in the office." *Boggertman*, 984 F.2d at 580.

Here, Hogan was authorized to negotiate settlements, direct investigators, and counsel witnesses, all of which may implicate policy considerations. Furthermore, her job description clearly contemplated that she might be relied upon to render legal advice implementing public policy, and that she might choose a litigation strategy or set legal precedent with an impact on public policy.

As this Court previously held in *Bavaro*, a Bureau prosecutor's authority is such that a political allegiance may be said to be rationally related to the performance of the job. *See Mummau v. Ranck*, 531 F. Supp. 402, 405 (E.D. Pa.), *aff'd*, 687 F.2d 9 (3d Cir. 1982) (where job duties "'contemplate' that the public officer 'might' be relied upon to render legal advice implementing policy, the official is not protected by *Elrod Branti*"); *Ness v. Marshall*, 660 F.2d 517, 522 (3d Cir. 1981). Indeed, other courts have held similarly in cases involving government attorneys. *See e.g., Tranello*, 758 F. Supp. at 847 ("Government attorneys, because they are attorneys must advocate the positions of and counsel the government official for whom they work"); *O'Connell v. Gorski*, 715 F. Supp. 1201, 1204 (W.D.N.Y. 1989) (assistant Erie County attorney); *Ness v. Marshall*, 660 F.2d 517, 522 (3d Cir. 1981) (city solicitor); *Clark v. Brown*, 861 F.2d 66 (4th Cir. 1988) (assistant district attorney); *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) (deputy city attorney).

In summary, most of the factors enunciated in *Vezzetti* operate in favor of the conclusion that Hogan is not protected from political discharge. Accordingly, the Court finds that Defendants did not violate Plaintiff's constitutional rights in discharging her from her position at the Bureau. Naturally, then, in so far as the individually named defendants are concerned, they are entitled to qualified immunity in that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have know.

D. Plaintiff's State Law Claims

In her second cause of action, Plaintiff alleges that Defendant violated her rights under the New York Constitution as well. However, before the Court delves into the merit of these claims, it must first determine whether the Court should exercise supplemental jurisdiction over there purely state claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

It is now well settled that although the doctrine of supplemental jurisdiction is one of flexibility and discretion, it is a fundamental that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726; *see Young v. New York City Transit Authority*, 903 F.2d 146, 163-64 (2d Cir. 1990). "A district court ought not 'reach out for … issues, thereby depriving state courts of opportunities to develop and apply state law.'" *Young*, 903 F.2d at 164 (*quoting Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 757 (2d Cir. 1986). These same principles underlie our 11th Amendment jurisprudence:

> A federal court's grant of relief against state officials on the basis of state law … does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106 (1984). Thus, supplemental jurisdiction should not be exercised merely because "the exercise of such judicial power

is desirable or expedient." *United States v. Town of North Hempstead*, 610 F.2d 1025, 1029 (2d Cir. 1979).

Because Hogan is not entitled to *Elrod-Branti* protection as a matter of law, no federal question remains. Therefore, the Court declines to exercise jurisdiction over Hogan's claims implicating the New York State Constitution.

III. CONCLUSION

In summary, the Court finds that the individually named defendants are entitled to qualified immunity. In addition, the Court finds that none of the defendants violated Plaintiff's federal constitutional rights in discharging Hogan from her position at the Bureau. Furthermore, the Court declines to exercise jurisdiction over Hogan's claims implicating the New York State Constitution. For the stated reasons, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's Cross-Motion is DENIED.

IT IS SO ORDERED

January 11, 1997
Binghamton, New York

Thomas J. McAvoy
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RALPH J. BAVARO,

Plaintiff,

-versus- 96-CV-0121

(MOTION)

GEORGE E. PATAKI, et al.,

Defendants.

TRANSCRIPT OF PROCEEDING held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207, on MONDAY, JUNE 10, 1996, before the HON. THOMAS J. McAVOY, Chief United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFF:

RICHARD C. HAMBURGER, ESQ.

FOR THE DEFENDANTS:

HON. DENNIS VACCO, New York State Attorney General

BY: DARREN O'CONNOR, Assistant Attorney General

. . . . .

All right. As pointed out by both counsel, as a general rule, dismissal of a public employee for political reasons infringes upon the employee's constitutional right. *Elrod v. Burns*, 427 U.S. 347 at 360; *Branti v. Finkel*, 445 U.S. 507, 514-515.

To establish a prima facie Section 1983 claim that this termination constituted a violation of the First and Fourteenth Amendments, plaintiff must demonstrate initially that he engaged in constitutionally protected conduct and that such conduct was a substantial or motivating factor leading to dismissal. *Vezzetti v. Pellegrini*, 22 Fed 3d 483 at 487.

Ordinarily, plaintiff would have to offer evidence from which it could be inferred that his affiliation as a Democrat was a substantial or motivating factor in defendants' decision to terminate his employment. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287. In an apparent attempt to prevent plaintiff from making such a showing, defendants assert that his party affiliation had nothing to do with the decision to end his employment. Rather, they claim plaintiff was chosen at random from exempt Department of Health employees and was terminated to make room for an appointee who had actively supported the Pataki campaign.

The Court agrees with plaintiff that the distinction between firing him specifically because he is a Democrat and supported Mario Cuomo and firing him at random to provide positions for Pataki supporters is a distinction without a difference. The problem defendants' argument has is that an alternative view of termination to make positions available for political supporters is that the termination thus reflects a failure to support on the terminated employee's part. *Bennis v. Gable*, 823 Fed 2d 723, 731-32.

However, an individual's right not to support a given candidate is every bit as protected by the First Amendment that plaintiff's firing raises the same constitutional implications whether it resulted from random selection for patronage purposes or explicit retribution and plaintiffs have established a prima facie case.

Defendants respond that plaintiff's firing was permissible because he was among those employees who were not protected from political termination. It is true that there are situations where political affiliation is an appropriate requirement for employment purposes. Although *Elrod* and *Branti* generally protect public employees from being fired for political reasons, those cases provided exception [sic] under which the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Branti* at 518.

The Second Circuit has further clarified that political affiliation is an appropriate requirement when there's a rational relation between shared ideology and job performance. *Savage v. Gorski,* 850 Fed 2d at 68. As a result, if plaintiff's position, that of Associate Counsel in the Bureau of Professional Medical Conduct, falls within the *Elrod-Branti* exception, plaintiff's claim must be dismissed.

Court notes that the defendants bear the burden of demonstrating that political affiliation is an appropriate requirement for the effective performance of the position in question. *Vona v. County of Niagara*, 1995 Westlaw 222049, *6, quoting *Burns v. County of Cambria*, 971 Fed 2d 1015 at 1022, *cert. denied*, 506 U.S. 1081.

For purposes of the present motion, the threshold issue is whether plaintiff held a confidential or policymaking position. *Tranello v. Frey*, 758 Fed 2d 841, 845, *affirmed*, 962 Fed 2d 244, *cert. denied sub nom, County of Monroe v.*

Tranello, 506 U.S. 1034. Yet under *Elrod-Branti*, the Court emphasizes that the ultimate inquiry is not whether the label policymaker or confidential fits a particular position. *Branti* at 518.

The Second Circuit recently has clarified the factors to be considered in assessing the applicability of the *Elrod-Branti* exception. These factors include: Whether the employee is exempt from civil service protection; has some technical competence or expertise; controls others; is authorized to speak in the name of policymakers; is perceived as a policymaker by the public; influences government programs; has contact with elected officials; and is responsive to partisan politics and political leaders. *Vezzettiat* 486; *Regan v. Boogertman*, 984 Fed 2d 577, 580.

This listing, of course, is not exhaustive of the relevant factors to be considered and no single factor or group of factors is dispositive. Instead, all factors of a particular case must be considered in their totality to determine whether a rational connection exists between shared ideology and job performance. *Vezzetti* at 446.

Determination of whether a defendant has met its burden to show that political affiliation was necessary or essential to the effective performance of the positions involved typically is a matter of law for the Court. *Vona* at 1995 Westlaw 222049, *6, quoting *Stott v. Martin*, 725 Fed Supp 1365 at 1381; *reversed on other grounds sub nom Stott v. Haworth*, 916 Fed 2d 134.

Here, despite plaintiff's attempt to raise an issue of fact on nearly every relevant factor, the Court finds little to debate about the inquiries upon review of the record. First, plaintiff was exempt from civil service protection. Second, as an experienced litigator, plaintiff has technical competence and expertise; third, plaintiff controlled others, namely the Assistant Counsels in the Bureau; fourth, plaintiff is authorized

to speak in the name of policymakers. Whether he likes it or not, nearly every statement the plaintiff made as a prosecutor was made in the name of his superiors, most of whom were policymakers, because plaintiff was their representative.

Fifth, and in plaintiff's favor, he did not have contact with elected officials. Defendants admit this fact and downplay it in arguing that there are only four statewide elected officials in New York at the state level -- the Governor, Lieutenant Governor, Comptroller and Attorney General -- and only a limited number of policymakers can have direct contact with them.

Sixth, plaintiff is responsive to partisan politics and political leaders. On this point, plaintiff asserts that even if political issues go into the determination of whether to charge a given doctor with misconduct, he has no authority to be involved in the process. However, because plaintiff is empowered with the duty to execute what are often political decisions, by actually prosecuting the doctor, the Court will not countenance the argument that he is not at all responsive to politics and political leaders.

Seventh, plaintiff earned a high salary in his position as Associate Counsel. Although not included in the *Vezzetti* factors, a high salary typically is viewed as an additional common characteristics of jobs for which political affiliation is rationally related to job performance. *Savage* at 68, *Tranello v. Frey* at 847.

The two remaining *Vezzetti* factors are whether plaintiff is perceived as a policymaker by the public and whether he influences government programs, essentially bring the Court back to the question of whether plaintiff was, in fact, a policymaker. The Court concedes that the answer to this inquiry is not as clear-cut as the other relevant factors. Plaintiff attempts to narrowly define his employment function so as to exclude any policy-related or confidential job duties

and defendants describe plaintiff's position in the broadest terms, apparently focusing on what plaintiff might have done in addition to what his actual duties were.

Defendants are correct that in examining the nature of any given position, the Court should not look merely at the actions of the employee while in office, rather it should look also at the power with which the employee is vested by law and which is inherent in the office. *Boogertman* at 580.

After performing this analysis, it's apparent that plaintiff's action and authority placed him in a position in the governmental spectrum for which political allegiance is rationally related to the performance of the job. The Court agrees that so long as applicable statutes, regulations, case law and job descriptions contemplate that the public officer might be relied upon to render legal advice implementing policy, the official is not protected by *Elrod* and *Branti*. *Mummau v. Ranck*, 531 F. Supp. 402 at 405, *affirmed* 687 Fed 2d 9; *Ness v. Marshall*, 660 Fed 2d 517 at 522.

Although it was not among his typical duties, the Court does not believe it possible that plaintiff could never be relied upon to render legal advice implementing policy. The simple fact that he was a prosecutor for the government is almost all the information the Court needs to reach this conclusion.

Perusal of plaintiff's job description provides further evidence that plaintiff should not be protected from political dismissal. It is undisputed that one of his job responsibilities was to determine litigation strategy. Although plaintiff disputes it, defendants have provided a seemingly fair explanation that this responsibility entails taking into account the quality of the investigative work, impact on public policy, impact on patients and citizens, and tactics of opposing counsel. The Court sees no reason why such policy-related considerations would be any less applicable to plaintiff as a

prosecutor determining litigation strategy than they would be to any other prosecutor.

Defendants also correctly note that the Bureau's Associate Counsel are setting important precedent with each case they prosecute. Defendants cite the issues raised in a recent prosecution by the Bureau regarding acceptable alternatives to hospital delivery of infants. Finally, plaintiff was authorized to negotiate settlements, direct investigators and counsel witnesses, all of which may implicate policy considerations.

In summary, at least seven of the nine factors enunciated in *Vezzetti* and *Savage* indisputably operate in favor of the conclusion that plaintiff is not protected political discharge. Furthermore, his job description clearly contemplated that he might be relied upon to render legal advice implementing public policy; and that he might choose a litigation strategy or set legal precedent with an impact on public policy.

From the Court's perspective, defendants, by confirming these facts, have satisfied their burden of establishing a rational relation between shared ideology and job performance. To put it another way, political considerations certainly do not factor into all or even most of the job duties of Associate Counsel, but it is rational to believe that such considerations could come into play at some point in an Associate Counsel's career. That's all defendants need to establish.

In the alternative, the defendants argue that they cannot be held liable for damages on plaintiff's constitutional claims because they are protected by the good faith qualified immunity doctrine. The Supreme Court has emphasized the importance of resolving the issue of qualified immunity early in the proceedings. Whether qualified immunity is applicable is a question of law, not fact, for the trial Judge to resolve long

before any trial. *Hunter v. Bryant*, 502 U.S. 224 at 229. *Harlow v. Fitzgerald*, 457 U.S. 800 at 818, articulated the test that still controls today: Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know.

The Court has already determined that the defendants' action in firing plaintiff did, in fact, comport with the First and Fourteenth Amendments, so it follows that a reasonable state officer could have believed that the firing did not violate plaintiff's constitutional rights. However, even if plaintiff eventually was found to be protected from political termination by the First and Fourteenth Amendments, the Court believes that the law is sufficiently murky or the factual question sufficiently close that a reasonable state officer could still believe that plaintiff's firing was permissible under the Constitution. Either way, therefore, defendants are entitled to qualified immunity from liability in regard to plaintiff's First and Fourteenth Amendment claims. See *Tranello* at 848.

Plaintiff has withdrawn his third cause of action under which he claimed defendants' conduct violated New York Civil Service Law 107, so that cause of action is dismissed. Furthermore, because plaintiff is not entitled to *Elrod-Branti* protection as a matter of law, the Court need not address defendants' Eleventh Amendment arguments. With no federal basis remaining, the Court declines to exercise jurisdiction over plaintiff's state constitutional claim.

For the stated reasons, defendants' motion for summary judgment is granted, plaintiff's cross-motion is denied. Defendant will submit an order.